DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	
In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
Cable Home Wiring	)	

FURTHER JOINT REPLY COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE

Introduction

The joint commenters agree with the many parties that have recommended modifying the rules proposed in the Commission's Further Notice of Proposed Rulemaking released August 28, 1997 (the "Further Notice") to make them more effective in promoting competition. In addition, we urge the Commission not to require building owners to assume ownership of wiring, but to allow building owners and video programming providers to resolve that issue as they see fit in

individual cases. The Commission should also ensure that any final rules are grounded in solid factual evidence and respect the limits of the Commission's lawful powers.

I. MANY COMMENTERS AGREE THAT TO BE EFFECTIVE THE PROPOSED RULES MUST BE REVISED IN SEVERAL RESPECTS.

In our Further Comments in these two dockets, filed September 15, 1997, we noted that for the proposed rules to achieve the Commission's goals they would need to be modified in several important respects. In their current form, they leave too much discretion in the hands of the incumbent video programming provider and do not adequately protect the interests of building owners. Many other commenters raised the same issues. There is broad agreement from commenters outside the cable industry that the proposed rules should be changed in the following ways:

- Incumbent operators must be required to post a bond before removing wiring. *See* Independent Cable & Telecommunications Association ("ICTA") Comments at 5-6; Community Associations Institute ("CAI") Comments at 14-15; Comments of RCN Telecom Service, Inc. ("RCN") at 15.

- Operators should not be permitted to abandon wiring without the consent of the building owner. *See* CAI Comments at 16.

- Access to molding and conduit should be permitted only with the prior consent of the building owner. *See* Comments of SBC Communications, Inc. ("SBC") at 6-7; Comments of GTE Service Corp. ("GTE") at 16.

- The Commission should shorten the notice requirements and other deadlines. *See* ICTA Comments at 7-8; CAI Comments at 11-14; SBC Comments at 3-4; RCN Comments at 13; Echostar Communications Corp. Comments at 2; Wireless Cable Association ("WCA") Comments at 12-13; Ameritech New Media ("Ameritech") Comments at 2-4.

- Incumbent operators should have an affirmative obligation to provide service until the new provider is ready to begin operations in the building. *See* ICTA Comments at 3-4; CAI Comments at 18; RCN Comments at 14; WCA Comments at 11-12.

- The price of wiring should be determined through free market negotiation. *See* ICTA Comments at 6-7; SBC Comments at 5-6; RCN Comments at 13; OpTel, Inc. ("OpTel") Comments at 4; GTE Comments at 10-11.

II. OWNERSHIP OF WIRING SHOULD NOT BE TRANSFERRED TO A BUILDING OWNER WITHOUT THE BUILDING OWNER'S CONSENT.

The Further Notice asked whether video programming providers should be required to transfer ownership of wiring to building owners under contracts entered into after the effective date of any new rules. Several commenters supported this proposal. *See, e.g.* DIRECTV, Inc. Comments at 16-17; Ameritech Comments at 8-10. We agree with the Community Associations Institute, however, that the Commission should not adopt such a rule. CAI Comments at 6. The Commission itself acknowledges that some building owners may not want to own wiring. Further Notice at ¶ 44. While many building owners would welcome the opportunity to own the wiring in a building, such ownership entails the additional responsibility and expense of maintaining the wiring. Consequently, many building owners are not interested in assuming title to wiring.

For that reason, we believe this is not an appropriate area for regulation. Building owners and programming providers can best handle this on a case-by-case basis.

Furthermore, as we stated in our Further Comments and elsewhere, we would not support any rule that would effect a taking of wiring. Any forced sale raises the possibility of a taking and is an inappropriate mechanism for the Commission to use.

III. BEFORE MAKING ANY ASSUMPTIONS ABOUT THE TERMS UNDER WHICH BUILDING OWNERS CURRENTLY GRANT ACCESS TO VIDEO PROGRAMMING PROVIDERS, THE COMMISSION SHOULD CONDUCT A SCIENTIFIC AND STATISTICALLY VALID STUDY.

In a reprise of their earlier comments in Docket No. 92-260, some members of the cable industry operators allege that building owners are the true roadblock to competition because they are concerned only with obtaining income from cable operators and their competitors. *See, e.g.,* Comments of Time Warner Cable ("Time Warner") at 8. This is regrettable, because it obscures the real issues in this proceeding. The Commission, on the other hand, has correctly recognized both that building owners have good reason to consider the interests of their residents and that confusion over legal rights is a major obstacle to competition. Further Notice ¶¶ 31, 47.

The cable industry, however, has no real evidence to support its argument. Their factual support consists entirely of anecdotes, and anecdotes prove nothing because they can be used to prove anything. There are hundreds of thousands of buildings in this country. We concede that some building operators negotiate with video programming providers to obtain return for access to their buildings. Indeed, we concede that in some cases video programming providers are willing to pay a significant amount of money in return for the right to serve the residents of a building. But this is not the issue. The issue is whether such payments impede competition, and the Commission has no evidence that they do.

We believe that most building owners do not charge access fees because they recognize that providing their residents with reasonably-priced video programming is simply good business, and benefits all concerned. Furthermore, in many cases the economics of serving a building do not justify requiring the provider to pay a fee. In those cases in which building owners do receive fees, we believe that they are generally very small. But these are suppositions on our part, just as the cable industry's evidence amounts to no more than supposition. Without

sound evidence that the anecdotes presented by the cable operators are an accurate depiction of the industry as a whole, the Commission cannot be guided by it.

For the same reason, the Commission should reject the claim of some parties that the proposed rules should not apply if the building owner receives an access payment. *See, e.g.,* Cablevision Systems Corp. ("Cablevision") Comments at 17-18. There is no evidence that such a rule would actually change anything, and it would only create yet another exception to an already complicated set of regulations.

The Commission has gathered information about the number of multiple dwelling units in the country, and the proportion of the housing market made up by MDU's. Further Notice at ¶ 26. We believe that if the Commission were to conduct amore extensive survey and gather statistically valid, scientifically sound evidence, it would support our argument rather than the cable industry's.

In the absence of such a survey, however, the Commission has reached the right conclusion: building owners have every incentive to promote competition and consider the interests of tenants certainly an economic interest equal to or possibly greater than either incumbent video programming providers or alternative providers. *See also* OpTel Comments at 5-6. This is simple logic, since the relationship between a property owner and a resident is much closer and more interdependent than that between a cable company and a subscriber. In addition, apartment residents have many choices because apartment owners have many competitors.

IV. THE FUNDAMENTAL PROBLEM REMAINS THE LARGE NUMBER OF EXCLUSIVE LONG-TERM AND PERPETUAL CONTRACTS ENTERED INTO IN THE DAYS OF MONOPOLY CABLE SERVICE.

Many building owners are locked into unfavorable exclusive contracts that they signed in an effort to provide services to their tenants at a time when the monopoly cable operator was the only source of multichannel video programming. As long as these contracts remain in force, building owners will not be able to provide their residents with alternatives. As current contracts expire, property owners will be able to offer tenants more options. In addition, having developed a body of experience in dealing with such issues as the ownership of wire, building owners today are much more sophisticated than they were when their original contracts were signed. Thus, many of the Commission's concerns are being addressed.

Nevertheless, perpetual and extremely long-term contracts will remain a problem – to be effective, the Commission's regulatory scheme must address that issue. The Commission has recognized that the proposed rules are not a compete solution to the problems it seeks to address. Further Notice at ¶ 3. On the other hand, such a solution would require intervention in contractual relationships, which we have never advocated and which would raise many more difficult issues. The Commission may find that discretion is the better part of valor.

V. THE COMMISSION SHOULD REJECT ANY SUGGESTION THAT MANDATING ACCESS TO BUILDINGS WOULD BE CONSTITUTIONAL OR WITHIN ITS STATUTORY AUTHORITY.

We have vigorously objected to even the slightest indication that the Commission should mandate physical access by any provider to a building without the consent of the building owner. See Further Comments at 8-11; Comments of the Joint Commenters in Docket No. 95-184 (filed

March 18, 1996) at pp. 5-17; Reply Comments of the Joint Commenters in Docket No. 95-184 (filed April 17, 1996) at pp. 6, 10.

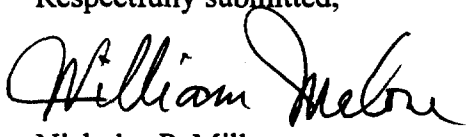
Several commenters have sung the praises of state mandatory access laws as if they were a panacea for the alleged ills of the cable industry. *See, e.g.,* Cablevision Comments at 6. The Commission does not have the authority to mandate such action, however, and any attempt to do so would violate the Constitution. We are pleased to note that Time Warner acknowledges the Commission's lack of statutory authority by suggesting that the FCC ask Congress to adopt a national mandatory access law. Time Warner Comments at n. 23. This reinforces our own statements regarding the Commission's lack of the necessary authority.

Conclusion

Once again, we applaud the Commission's efforts, but remain skeptical that the proposed rules will have the desired effect. At a minimum, they must be strengthened in the ways outlined

above and in the comments of other parties. However the Commission chooses to resolve the matter, we urge it to respect the boundaries imposed by the Constitution and the Communications Act.

Respectfully submitted,



Nicholas P. Miller
William Malone
Matthew C. Ames

MILLER & VAN EATON, P.L.L.C.
1155 Connecticut Avenue
Suite 1000
Washington, D.C. 20036-4306
Telephone: (202) 785-0600
Fax: (202) 785-1234

Attorneys for Building Owners and Managers Association International, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Multi-Housing Council, and National Realty Committee

Of Counsel:

Gerard Lavery Lederer
Vice President -- Industry and Government Affairs
Building Owners and Managers
Association International
1201 New York Ave., N.W.
Suite 300
Washington, D.C. 20005

Roger Platt
National Policy Counsel
National Realty Committee
1420 New York Ave., NW
Suite 1100
Washington, D.C. 20005

October 6, 1997

G:\client\107379\01\Home Wiring Further Reply.doc